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No. 85-193

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

U.S. TRUST CORPORATION,
Petitioner,
v.
THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

MEMORANDUM OF RESPONDENTS FLORIDA DEPARTMENT OF BANKING AND FINANCE, FLORIDA BANKERS ASSOCIATION, SUN BANK/PALM BEACH, AND CONFERENCE OF STATE BANK SUPERVISORS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
POSITION OF RESPONDENTS	3
I. THE DECISION BELOW IS FULLY CONSISTENT WITH THE PURPOSES AND LEGISLATIVE HISTORY OF THE BANK HOLDING COMPANY ACT AND, THEREFORE, SHOULD BE UPHELD	3
A. The Purpose of the Douglas Amendment	5
B. The Legislative History of the Definition of "Bank" in Section 2(c) of the BHC Act	8
C. The Board's Responsibility under Section 5(b)	12
II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *LEWIS*	15
III. THE OUTCOME IN THE *DIMENSION* CASE SHOULD NOT AFFECT THE VALIDITY OF THE DECISION BELOW	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

American Trucking Associations v. United States, 344 U.S. 298 (1953) 15
Citicorp, 71 Fed. Res. Bull. —— (Aug. 1, 1985) 15
Dimension Financial Corp. v. Board of Governors of the Federal Reserve System, 744 F.2d 1402 (10th Cir. 1984), *cert. granted*, 105 S. Ct. 2137 (1985) ..... *passim*
First National Bank in Plant City v. Dickinson, 396 U.S. 122 (1969) 7
Florida Department of Banking & Finance v. Board of Governors of the Federal Reserve System, 760 F.2d 1135 (11th Cir. 1985) ..... *passim*
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 15-17
Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973) 13, 14
Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System, 105 S. Ct. 2545 (1985) 7, 8
Ozawa v. United States, 260 U.S. 178 (1922) 5
Perry v. Commerce Loan Co., 383 U.S. 392 (1966) 5
Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976) 5
United States v. American Trucking Associations, 310 U.S. 534 (1940) 5, 15
U.S. Trust Corp., 70 Fed. Res. Bull. 371 (1984) ..... *passim*
Wilshire Oil Co. v. Board of Governors of the Federal Reserve System, 668 F.2d 732 (3d Cir. 1982), *cert. denied*, 457 U.S. 1132 (1982) 14, 15

STATUTES:

Act of May 9, 1956, ch. 240, 70 Stat. 133
§ 2(a)(B), 70 Stat. 133 ..... 6, 7
§ 2(c), 70 Stat. 133 6
Act of July 1, 1966, Pub. L. No. 89-485, 80 Stat. 235
§ 3, 80 Stat. 236 9
§ 7(d), 80 Stat. 237 9

TABLE OF AUTHORITIES—Continued

	Page
Act of December 31, 1970, Pub. L. No. 91-607, § 101(c), 84 Stat. 1761	10
Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841-50	*passim*
Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, §§ 312 and 333, 96 Stat. 1496, 1504	16
McFadden Act, 12 U.S.C. § 36	7
Truth in Lending Act, 12 U.S.C. § 1604	13
LEGISLATIVE HISTORY MATERIALS:	
101 Cong. Rec. 3821-24 (1955)	8
102 Cong. Rec. 6857-60 (1956)	5-8
102 Cong. Rec. 6862 (1956)	8
102 Cong. Rec. 6942, 6948, 6950-51, 6963 (1956)	7
102 Cong. Rec. 6957 (1956)	7
116 Cong. Rec. 14818-21 (1970)	10
116 Cong. Rec. 25848 (1970)	11
H.R. Rep. No. 609, 84th Cong., 1st Sess. (1955)	8
S. Rep. No. 1095, 84th Cong., 1st Sess. (1955), *reprinted in* [1956] U.S. Code Cong. & Ad. News 2482	8, 13
S. Rep. No. 1179, 89th Cong., 2d Sess. (1966), *reprinted in* [1966] U.S. Code Cong. & Ad. News 2385	9
Conf. Rep. No. 1747, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] U.S. Code Cong. & Ad. News 5561	11
One-Bank Holding Company Legislation of 1970: Hearings on S. 1052, et al., before the Senate Committee on Banking and Currency, 91st Cong., 2d Sess. 136-37 (1970)	11
MISCELLANEOUS:	
12 C.F.R. § 225.25	17
Applicability of Bank Holding Company Act to Industrial Banks, 49 Fed. Res. Bull. 165 (1963)	7
Suspension of Processing of Applications to Acquire Nonbank Banks, 71 Fed. Res. Bull. 323 (1985)	17

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MEMORANDUM OF RESPONDENTS FLORIDA DEPARTMENT OF BANKING AND FINANCE, FLORIDA BANKERS ASSOCIATION, SUN BANK/PALM BEACH, AND CONFERENCE OF STATE BANK SUPERVISORS

INTRODUCTION

This Memorandum is submitted by Respondents Florida Department of Banking and Finance, Florida Bankers Association, Sun Bank/Palm Beach and Conference of State Bank Supervisors,[1] in response to the petition

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[1] Pursuant to Rule 28.1 of the Rules of this Court, Florida Bankers Association represents that it is a membership association representing more than 90 percent of the commercial banks and bank holding companies in Florida. Sun Bank/Palm Beach is a subsidiary of Sun Banks, Inc., which is a subsidiary of SunTrust Banks, Inc. The Conference of State Bank Supervisors ("Conference") is the professional association of state government officials responsible for regulating more than 10,000 state-chartered banking institutions, with total assets of approximately $1 trillion, in the 50 states and in Guam, Puerto Rico and the Virgin Islands. In 1958,

for certiorari filed by U.S. Trust Corporation. For the reasons stated in this Memorandum, Respondents maintain that the decision below by the Eleventh Circuit Court of Appeals [2] is correct and need not be reviewed by this Court.

Respondents note, however, that this Court presently has under review *Dimension Financial Corp. v. Board of Governors*, 744 F.2d 1402 (10th Cir. 1984), *cert. granted*, 105 S. Ct. 2137 (1985) ("*Dimension*"), which, like this case, presents legal issues concerning the status of "nonbank banks"—*i.e.*, chartered banking institutions which, purportedly, either do not accept demand deposits or do not make commercial loans and therefore claim to escape regulation as "banks" under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841-50 ("BHC Act").[3] Respondents submit that the legal issues presented in this case and in *Dimension* are distinct. The Tenth Circuit Court of Appeals in *Dimension*, 744 F.2d at 1410, expressly *declined* to consider the question which lies at the heart of *this* case—*viz.*, whether a bank holding company may establish a deposit-taking bank across state lines without state authorization pursuant to Section 3(d) of the BHC Act, popularly known as the "Douglas Amendment."[4] Respondents therefore contend that the

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the Conference invited state-chartered banks to become "associate members," and there are currently about 3,600 such associate members. Associate members, however, may not vote at meetings of the Conference and therefore do not vote on decisions or policies of the Conference.

[2] *Florida Department of Banking and Finance v. Board of Governors*, 760 F.2d 1135 (11th Cir. 1985), *reprinted in* Appendix to Petition for Certiorari ("Pet. App.") at A1 through A17.

[3] Section 2(c) of the BHC Act, as amended, 12 U.S.C. § 1841(c), defines "bank," in pertinent part, as any institution "which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."

[4] The Douglas Amendment, 12 U.S.C. § 1842(d), prohibits a bank holding company whose principal bank subsidiaries are located

decision below should stand (either by denial of certiorari or by summary affirmance) regardless of this Court's disposition of *Dimension*.[5]

Nevertheless, Respondents have an understandable concern that this Court's decision on the separate issues presented in *Dimension* could affect the decision below.[6] If this Court should determine that its disposition of *Dimension* could affect the validity of the decision below, Respondents request that this case be fully briefed, heard on oral argument and decided in tandem with *Dimension*.

POSITION OF RESPONDENTS

I. THE DECISION BELOW IS FULLY CONSISTENT WITH THE PURPOSES AND LEGISLATIVE HISTORY OF THE BANK HOLDING COMPANY ACT AND, THEREFORE, SHOULD BE UPHELD

The court below correctly decided that the Federal Reserve Board ("Board") violated the BHC Act when it permitted U.S. Trust Corporation ("U.S. Trust"), a New York bank holding company, to establish a deposit-taking national bank in Florida *without* Florida's specific authorization pursuant to the Douglas Amendment.[7] As the

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in one state from acquiring any bank located in another state *unless* such acquisition "is specifically authorized by the statute laws of the State in which such bank is located."

[5] *See* Part III, *infra*.

[6] The Florida Bankers Association and the Conference (along with the Oklahoma Bankers Association) have filed a brief as *amici curiae* in support of the petitioner in *Dimension*. That brief (at pages 3-4, 5 n.8, 15, 18 and 26) pointed out the relationship between the issues raised in *Dimension* and those decided by the court below.

[7] In 1984, U.S. Trust received permission from the Board and the Comptroller of the Currency to convert its nondeposit state-chartered trust company in Florida into a *chartered national bank*, U.S. Trust Company of Florida, N.A. ("U.S. Trust-Florida"),

court concluded, the Board's decision contravened the fundamental purpose of the Douglas Amendment, which is "to prevent bank holding companies from acquiring deposit-taking banks across state lines without state authorization." 760 F.2d at 1141, Pet. App. A11-A12. Indeed, the court determined that the Board's order would lead to a "total emasculation" of the Douglas Amendment by permitting bank holding companies to establish an unlimited number of interstate deposit-taking banks without state approval. *Id.* at 1141-42, A12-A13. The Court therefore properly held (*id.* at 1143-44, A16-A17) that the Board should have denied U.S. Trust's application pursuant to its authority to "prevent evasions" of the BHC Act under Section 5(b) thereof, 12 U.S.C. § 1844(b).

U.S. Trust argues that the decision below is contrary to the "plain meaning" of Section 2(c) of the BHC Act. According to U.S. Trust, the "plain meaning" of Section 2(c) gives bank holding companies the *unlimited* right to establish deposit-taking banks across state lines *without* regard to the Douglas Amendment, so long as such banks refrain from making commercial loans.[8]

As recognized by the court below, however, "plain meaning" is only the beginning and not the end of statutory construction. 760 F.2d at 1138-39, Pet. App. A6-A7. Indeed, this Court has repeatedly held that the "plain meaning" of a single provision in a statute may *not* be followed blindly to reach a result "plainly at var-

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which could accept demand and time deposits (*i.e.*, checking and savings accounts) and make all types of loans except for those which were deemed to be "commercial loans" under the Board's Regulation Y. Because U.S. Trust-Florida did not make commercial loans, it claimed to be a "nonbank bank." *See* 760 F.2d at 1137, Pet. App. A3-A4; *U.S. Trust Corp.*, 70 Fed. Res. Bull. 371, 372 (1984), Pet. App. A18-A19.

[8] U.S. Trust Petition for Certiorari ("Pet.") at 9-11. *See* note 3, *supra*.

iance with the policy of the legislation as a whole," [9] or applied mechanically in a way which ignores the relevant legislative history.[10]

Apparently recognizing that "plain meaning" cannot be relied upon to override the actual intent of Congress, U.S. Trust seeks to find support for its position in the legislative history of the Douglas Amendment and Section 2(c). In this regard, U.S. Trust asserts that (i) Congress did *not* intend in 1956 to require state authorization for the establishment by bank holding companies of interstate deposit-taking banks so long as such banks did not make commercial loans, or (ii) even if Congress had such a purpose in 1956, it *abandoned* that objective in 1970, when it amended Section 2(c).

U.S. Trust's arguments, however, are completely contrary to the clear intent of both the Douglas Amendment and the 1970 amendment to Section 2(c), as reflected in the relevant legislative history. In contrast, the decision below faithfully applied the congressional purposes underlying both statutes, and therefore should be upheld.

A. The Purpose of the Douglas Amendment

As the court below correctly determined, the fundamental purpose of the Douglas Amendment is to "prevent bank holding companies from acquiring deposit-taking banks across state lines without state authorization." 760 F.2d at 1141, Pet. App. A11-A12. In the 1956 Senate debate on the Douglas Amendment, Senator Douglas declared that his Amendment was designed to prevent "an undue concentration of banking and financial power" by prohibiting the further expansion of bank holding companies across state lines. 102 Cong. Rec. 6857 (1956). In ex-

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[9] *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940), *quoting Ozawa v. United States*, 260 U.S. 178, 194 (1922). *Accord, Perry v. Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966).

[10] *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 9-10 (1976).

plaining the dangers to competition presented by such expansion, Senator Douglas pointed out that Transamerica Corp., First Bank Stock Corp., Northwest Bancorporation and First Security Corp. *each* owned banks in several states through which they controlled, individually or collectively, more than 20 percent of the bank deposits in at least nine states (including a majority of such deposits in at least two states). Senator Douglas concluded that the best way to forestall the continued growth of such interstate deposit-taking networks was to prohibit bank holding companies "from expanding across State lines, unless the States give them explicit permission to do so." *Id.* at 6858-60.

In contravention of the clear import of Senator Douglas' remarks, U.S. Trust asserts that the *sole* purpose of the Douglas Amendment was "to avoid the monopolization of commercial credit," and then leaps to the startling conclusion that Senator Douglas and his colleagues were *unconcerned* with interstate deposit-taking by bank holding companies. Pet. 16-17. U.S. Trust's position is untenable for several reasons.

First, the definition of "bank" adopted by Congress in 1956, when it enacted the Douglas Amendment, included *all* chartered national and state banks and did *not* exclude banks which took deposits but made no commercial loans.[11] Thus the "plain meaning" of the Douglas Amendment, as adopted in 1956, applied to *all* chartered, deposit-taking banks.[12]

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[11] The original 1956 definition of "bank" included "any national banking association or any State bank, savings bank or trust company." Act of May 9, 1956, ch. 240, § 2(c), 70 Stat. 133.

[12] U.S. Trust points out that "Morris Plan" industrial banks, which accepted deposits, were exempted from the BHC Act in 1956. Pet. 17-18. U.S. Trust ignores, however, that these banks were exempted from the Act *only* because their parent holding company, Equity Corp. (which controlled Morris Plan Corp. of America) was specifically exempted under Section 2(a)(B) of the 1956 Act *because of its status as a registered investment company.* Otherwise, the Morris Plan banks *would* have been regulated under the

Second, U.S. Trust ignores the clear congressional purpose to ensure that the federal prohibition against interstate deposit-taking through bank branches would *also* be applied to bank holding companies. As this Court recognized in *Northeast Bancorp, Inc. v. Board of Governors*, 105 S. Ct. 2545, 2552 (1985), the Douglas Amendment was designed to prevent bank holding companies from continuing to evade the prohibition against interstate branch banking in the McFadden Act, 12 U.S.C. § 36, by establishing separate bank subsidiaries across state lines. Under the McFadden Act, the *acceptance of deposits* through a remote facility is sufficient *without more* to constitute "branching," [13] and it is therefore clear that U.S. Trust would have been *barred* under the McFadden Act from establishing a national bank in New York with a deposit-taking branch in Florida. Thus, in view of the Douglas Amendment's policy to prevent evasions of the McFadden Act, the Douglas Amendment clearly prohibited U.S. Trust from establishing a deposit-taking bank subsidiary in Florida.[14]

1956 Act. *See* Act of May 9, 1956, *supra* note 11, § 2(a)(B), 70 Stat. 133; 102 Cong. Rec. 6942, 6948, 6950-51 (remarks of Sen. Morse); *id.* at 6963 (remarks of Senator Capehart). Other so-called "industrial banks," which engaged primarily in lending, were exempted from the 1956 Act *only* if they did *not* accept deposits like those accepted by commercial banks. *See id.* at 6957 (remarks of Senators Martin and Robertson); *Applicability of Bank Holding Company Act to Industrial Banks*, 49 Fed. Res. Bull. 165, 166 (1963).

[13] The McFadden Act defines "branch" to include "any branch place of business . . . at which deposits are received, *or* checks paid, *or* money lent. 12 U.S.C. § 36(f) (emphasis added). The exercise of *any one* of the three enumerated functions at a remote facility will make that facility a "branch." *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 134-35 (1969).

[14] Indeed, Senator Douglas declared that his Amendment was "*a logical continuation of the principles of the McFadden Act*, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy." 102 Cong. Rec. 6860 (1956) (emphasis added).

Finally, U.S. Trust overlooks Congress' clear understanding in 1956 that the taking of deposits from the public is the fundamental source of banking power. Indeed, Congress correctly perceived that deposits provide banks with their primary resource for extending credit and making investments.[15] As the court below pointed out,[16] the enactment of the Douglas Amendment reflected Congress' decision to preserve local control over deposit-taking banks, in order to ensure a banking system which would be responsive to local consumer and business needs.[17] Indeed, this Court has recently confirmed that the Douglas Amendment establishes "local, community-based control over banking." *Northeast Bancorp*, 105 S. Ct. at 2553.

In contravention of this clear congressional mandate, U.S. Trust would interpret the Douglas Amendment to *deprive* the states of effective control over banking institutions which provide the *most* important banking function, *viz.*, deposit-taking. U.S. Trust's position, therefore, must be rejected.

B. The Legislative History of the Definition of "Bank" in Section 2(c) of the BHC Act

The court below correctly concluded that U.S. Trust-Florida was a "bank" within the purview of the Douglas Amendment. First, the court found, and U.S. Trust does not contest, that U.S. Trust-Florida would be a "bank"

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[15] *See id.* at 6858-59 (remarks of Sen. Douglas); S. Rep. No. 1095, 84th Cong., 1st Sess. (1955), *reprinted in* [1956] U.S. Code Cong. & Ad. News 2482, 2483; H.R. Rep. No. 609, 84th Cong., 1st Sess. 14 (1955).

[16] 760 F.2d at 1141, 1143, Pet. App. A12, A15-A16.

[17] 102 Cong. Rec. 6862 (1956) (remarks of Sen. Payne); H.R. Rep. No. 609, *supra* note 15, at 2-6, 14-15; 101 Cong. Rec. 3821-24 (1955) (remarks of Rep. Spence, chairman of the House Banking and Currency Committee, quoting a speech by Speaker of the House Rayburn).

under Section 2(c) of the BHC Act as enacted in 1956 and amended in 1966. As already noted, the 1956 definition of "bank" included all chartered state and national banks. The 1966 amendment modified the "bank" definition to include all institutions "that accept deposits payable on demand." [18] In adopting this amendment, Congress determined that the acceptance of demand deposits (*i.e.*, checking accounts) was "the *commonly accepted test* of whether an institution is a commercial bank." [19]

U.S. Trust-Florida admittedly accepts demand deposits and is therefore a "bank" within the "commonly accepted test" adopted by Congress in 1966. Nevertheless, U.S. Trust relies upon the 1970 amendment to the defi-

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[18] Act of July 1, 1966, Pub. L. No. 89-485, § 3, 80 Stat. 236.

[19] S. Rep. No. 1179, 89th Cong., 2d Sess. (1966), *reprinted in* [1966] U.S. Code Cong. & Ad. News 2385, 2391 (emphasis added), *quoted in* 760 F.2d at 1139, Pet. App. A8.

It is noteworthy that the 1966 amendments to the BHC Act *also* included a provision to close an unintended loophole in the Douglas Amendment. This provision modified the Douglas Amendment by confirming that the "home state" of each bank holding company would be the state in which its "principal operations" were conducted (*i.e.*, the state in which the total deposits of its bank subsidiaries were the largest), and by *removing* the previous alternative designation of "home state" as the state in which the holding company's principal place of business was located. Act of July 1, 1966, *supra* note 18, § 7(d), 80 Stat. 237. The amendment was designed to *preclude* the possibility that a bank holding company could establish its principal office in one state and its principal bank subsidiaries in another and then claim that it had *two* home states in which it could acquire deposit-taking banks *without* state approval. *See* S. Rep. No. 1179, *supra*, [1966] U.S. Code Cong. & Ad. News at 2393 (intent of amendment is to "restrict[] expansion [of bank holding companies] to State where principal operations are conducted"). The amendment thus provides *further* confirmation of Congress' consistent intent to prohibit bank holding companies from creating interstate deposit-taking networks without state authorization.

nition of "bank" under Section 2(c),[20] which retained the demand deposit test while adding a reference to commercial lending. Pet. 14-15. The legislative history of the 1970 amendment, however, does not contain a shred of evidence to indicate that Congress in 1970 intended to take the radical step of *reversing* its decision in 1956 (which remained unchanged in 1966) to prohibit bank holding companies from acquiring deposit-taking banks across state lines without state approval.

In fact, the legislative history clearly shows, as the court below concluded, that the 1970 amendment was designed to exempt from the definition of "bank" *only*

> . . . a single *intrastate* institution [the Boston Safe Deposit and Trust Co. ("Boston Safe")]—or perhaps the very few entities similarly situated—which could be excluded from regulation under the [BHC] Act without giving rise to the kind of abuses which the Douglas amendment was designed to prevent.[21]

The 1970 amendment was introduced on the floor of the Senate, *without* comment, by Senator Brooke of Massachusetts.[22] However, the pertinent legislative history demonstrates that Boston Safe was the *only* institution known to Congress which would be exempted by the amendment.[23] Representative Gonzalez, a member of the

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[20] Act of Dec. 31, 1970, Pub. L. No. 91-607, § 101(c), 84 Stat. 1761. *See* note 3, *supra*.

[21] 760 F.2d at 1140, 1142, Pet. App. A10, A13 (emphasis added).

[22] 116 Cong. Rec. 14818-21 (1970). The court below interpreted the 1970 amendment as "a bit of local favoritism on the part of Senator Brook[e]" that was intended "to exempt a valued local institution without affecting other commercial banks." 760 F.2d at 1140 n.10, Pet. App. A10.

[23] U.S. Trust claims that U.S. Trust-Florida provides services that are "substantially similar" to those provided by Boston Safe in 1970. Pet. 11, 14. However, what U.S. Trust *ignores* is that Boston Safe was the *single, intrastate* bank subsidiary of the Boston Co. while U.S. Trust-Florida is an *additional, interstate* bank sub-

House Banking and Currency Committee, identified Boston Safe as "[v]irtually the only bank which does no commercial lending," and stated that "[t]he effect of the amendment is to exempt the Boston Co. [Boston Safe's parent holding company] from the bill." [24] Similarly, the Board advised Congress that it did not object to the 1970 amendment because "this amendment would have very limited application at present, possibly affecting only one institution." [25]

Similarly, the House conferees on the 1970 amendments to the BHC Act declared that the "exemption" for banks not making commercial loans was intended to apply *only* to "a very small number of special cases." [26] Moreover, they specifically instructed the Board to construe the exemption "as narrowly as possible in order that all bank holding companies which should be covered under the Act in order to protect the public interest will, in fact, be covered." [27] Thus, Congress undeniably intended to give the 1970 amendment an extremely narrow application.

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sidiary of U.S. Trust. It is precisely the *interstate* nature of U.S. Trust-Florida's establishment which implicates the Douglas Amendment.

[24] 116 Cong. Rec. 25848 (1970) (quoting from the *National Journal* of July 18, 1970).

[25] *One-Bank Holding Company Legislation of 1970: Hearings on S. 1052, et al., before the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 136-37 (1970) (Letter from Governor Robertson of the Board). In view of the Board's statement as to the "very limited application" of the 1970 amendment (*id.*), U.S. Trust's assertion that the Board recognized the "general applicability" of the amendment (Pet. 14) is untenable. Indeed, the Board itself has recently advised this Court that the 1970 amendment was "a technical amendment . . . designed to create a narrowly circumscribed exclusion from the [BHC] Act's coverage." Brief for the Board as Petitioner in *Dimension*, at 41.

[26] Conf. Rep. No. 1747, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] U.S. Code Cong. & Ad. News 5561, 5573-74.

[27] *Id.* at 5574.

In view of this unambiguous and compelling evidence of congressional intent, the court below correctly determined that the literal terms of Section 2(c) could *not* be relied upon by U.S. Trust-Florida—an *interstate* deposit-taking national bank—because such an interpretation would "destroy the Douglas Amendment by . . . permit[ting] bank holding companies to establish an unlimited number of deposit-taking banks across state lines without state approval." [28] In the absence of any evidence in the legislative history to suggest that Congress intended such a dramatic result, the court properly refused to permit a "total emasculation" of the Douglas Amendment.[29]

C. The Board's Responsibility under Section 5(b)

The court below correctly held that the Board was required under Section 5(b) of the BHC Act, 12 U.S.C. § 1844(b), to deny U.S. Trust's application.[30] In view of the court's conclusion that U.S. Trust's application evaded the fundamental purpose of the Douglas Amendment, its holding as to the Board's responsibility under Section 5(b) was mandated by the explicit terms and clear intent of the statute.

Section 5(b) provides:

> The Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this Act *and prevent evasions thereof.* [Emphasis added.]

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[28] 760 F.2d at 1141, Pet. App. A12. The court pointed out that the Board's decision in *U.S. Trust* had triggered an "avalanche" of applications by bank holding companies to establish "hundreds" of deposit-taking banks across state lines. *Id.* at 1138, A6. According to U.S. Trust, there are over 200 such applications currently pending before the Comptroller of the Currency. Pet. App. A35.

[29] 760 F.2d at 1141-42, Pet. App. A12-A13.

[30] *Id.* at 1143-44, A16-A17.

As indicated by the express language of Section 5(b), Congress went further than merely authorizing the Board to issue regulations and orders to "administer" the BHC Act. Congress *specifically directed* the Board to use its regulatory authority to "prevent evasions" of the Act.[31] The Board is thus charged with a broad responsibility under Section 5(b) to ensure that the purposes of the Act are not frustrated.

This Court has recognized the special mandate of the Board where, as in Section 5(b), Congress has granted to the Board regulatory authority not only to carry out the purposes of a statute but *also* to "prevent evasions" of the law. In *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), this Court considered the Truth in Lending Act, 12 U.S.C. § 1604 ("TILA"), which, in language similar to Section 5(b), directed the Board to "prevent circumvention or evasion" of TILA. Responding to a challenge that the Board had exceeded its authority by promulgating rules broadly defining classes of transactions to which TILA requirements would apply, this Court said:

> The Board was . . . empowered [under TILA] to define such classifications as were reasonably necessary to insure that the objectives of [TILA] were fulfilled, *no matter what adroit or unscrupulous practices were employed* by those extending credit to consumers." [411 U.S. at 366 (emphasis added).]

Thus, *Mourning* confirms that the Board's mandate under Section 5(b) to "prevent evasions" was properly applied by the Eleventh Circuit below. The Board specifi-

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[31] The Senate report on the BHC Act as originally enacted in 1956 confirms that Congress intended to "centralize[] Federal administrative control under the [Act] in the Board," and that Section 5(b) would empower the Board "to issue appropriate regulations and orders to carry out the purposes of the [Act] and to prevent evasion of its provisions." S. Rep. No. 1095, *supra* note 15, [1956] U.S. Code Cong. & Ad. News at 2495-96.

cally found that "approval of [the U.S. Trust application] presents a serious potential for undermining the policies of the Act," but believed that it was "constrained" by the literal terms of the definition of "bank" in Section 2(c) to approve the application.[32] The Eleventh Circuit agreed with the Board that its action would undermine the policies of the Act, and then construed the Board's responsibility under Section 5(b) in a manner consistent with this Court's admonition in *Mourning* that the Board should prevent "adroit or unscrupulous practices" designed to evade the statute's purposes.

The application of Section 5(b) by the Eleventh Circuit is further supported by the decision of the Third Circuit Court of Appeals in *Wilshire Oil Co. v. Board of Governors*, 668 F.2d 732 (3rd Cir. 1981), *cert. denied*, 457 U.S. 1132 (1982). In *Wilshire* the Board argued, contrary to its position in *U.S. Trust*, that it was *not* bound by the literal terms of Section 2(c). Instead, relying upon Section 5(b), it urged the Third Circuit to look to the *practical effect* of the transaction at issue, which was designed to evade the BHC Act.[33] The Third Circuit agreed with the Board and declared:

> While the language of the BHC Act may be the starting point in construing the statute, *we may look beyond the plain language*, if necessary, *to ensure that application of the literal terms does not destroy the practical operation of the statute.*
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> . . . .

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[32] 70 Fed. Res. Bull. at 372, Pet. App. A20.

[33] In *Wilshire*, the Board ordered Wilshire Oil Company to divest its bank in view of Wilshire's nonbanking activities which were impermissible for a bank holding company under Section 4 of the BHC Act. Wilshire sought to avoid divestiture by having its bank reserve the right to require 14 days' notice for withdrawals from its checking accounts. Wilshire claimed that, in view of this reservation of right to require notice (which was never intended to be exercised), its bank did not accept "demand deposits" and therefore was not a "bank" under Section 2(c).

> [W]e agree with the Board that § *5(b) "enables the Board to prohibit activities that are technically outside the literal terms of the Act in order to prevent a clear evasion of the purposes of the Act."* [34]

Wilshire thus underscores the broad mandate of the Board under Section 5(b) to prevent evasions of the BHC Act in whatever form they may take.

Relying upon the decision below and *Wilshire*, the Board itself has recently recognized that Section 5(b) not only authorizes but also *requires* it to prevent evasions of the BHC Act. In *Citicorp*, 71 Fed. Res. Bull. —— (Aug. 1, 1985), the Board found that the practical effect of Citicorp's application was to evade provisions of the BHC Act restricting the ability of bank holding companies to engage in insurance activities. The Board therefore denied the application, stating:

> The Board is authorized under Section 5(b) of the Act, *indeed in certain circumstances required*, to deny proposals that represent a clear evasion of the purposes of the Act, even if the proposal technically conforms to the terms of the Act.[35]

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *LEWIS*

U.S. Trust claims that the decision below "directly conflicts" with *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980). U.S. Trust contends that, under *Lewis*, the Douglas Amendment does not govern the interstate acquisition of a "depository nonbank bank." Indeed, U.S. Trust suggests that *Lewis* sanctioned the ac-

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[34] 668 F.2d at 735, 739 (emphasis added) (quoting Board order). In defining the duty of the Board and the courts to go beyond the literal terms of the BHC Act to ensure that its purposes are carried out, the Third Circuit relied upon this Court's decision in *American Trucking*, *supra* note 9, and *American Trucking Ass'ns v. United States*, 344 U.S. 298, 309-10 (1953). *See* 668 F.2d at 735-36, 738 n.13.

[35] *Citicorp*, slip op. at 4 n.2 (emphasis added) (citing the decision below and *Wilshire*).

quisition of "nonbank banks" by bank holding companies, pursuant to Section 4 of the BHC Act, *without* regard to the Douglas Amendment. Pet. 21.

U.S. Trust's contentions are misleading and entirely without merit. Contrary to U.S. Trust's suggestion, *Lewis* did *not* decide that bank holding companies could establish interstate deposit-taking *banks*, which do not make commercial loans, without complying with the Douglas Amendment. *Lewis* did not even consider whether such institutions could be considered as "nonbanks" for purposes of the Douglas Amendment and Section 4.

In fact, this Court determined in *Lewis* that, under the Commerce Clause, *state* law could not prohibit an out-of-state bank holding company from establishing a *nonbank* subsidiary to offer *nonbanking* investment advisory services, which could be provided by many firms *other than* banks and bank holding companies (*e.g.*, investment banking firms, trust companies and securities dealers). In contrast, the court below held that the Douglas Amendment, a *federal* statute, prohibited a bank holding company from acquiring an out-of-state *bank* which accepted demand deposits.[36] As the court below found, the acceptance of demand deposits is the essential function and "commonly accepted test" of *banking*, which (until 1982) no institutions *except banks* could provide even on a *partial* basis.[37] Thus, the holding in *Lewis* relating to

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[36] The court below expressly concluded that *Lewis* was *not* applicable to the issues presented in this case. 760 F.2d at 1143 n.17, Pet. App. A15.

[37] *See* notes 15-19, *supra*, and accompanying text. It is significant that, in 1982, when Congress *first* authorized federal savings and loan associations to accept demand deposits from a *limited* class of customers (*i.e.*, those who already have a business or agricultural lending relationship with the thrift institution), Congress *also* deemed it necessary to specifically *exempt* such institutions from treatment as "banks" under Section 2(c) of the BHC Act. Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, §§ 312 and 333, 96 Stat. 1496, 1504.

the ability of bank holding companies to offer *nonbanking* investment advisory services across state lines without regard to state law is *not* relevant to this case.

Moreover, U.S. Trust's argument is erroneous to the extent it suggests that "depository nonbank banks" are in fact an approved "nonbanking" activity under Section 4(c)(8). "Nonbank banks" are *not* a generally approved activity pursuant to the Board's regulations under Section 4(c)(8). *See* 12 C.F.R. § 225.25. On the contrary, as the court below noted, the Board has permitted the acquisition of such institutions only in certain discrete cases and with great reluctance. Indeed, the Board has approved *no* such acquisitions since March 15, 1985.[38]

In sum, U.S. Trust has *failed* to demonstrate that its establishment of a deposit-taking *bank* in Florida is an authorized *nonbanking* activity which, like the investment advisory services considered in *Lewis*, falls outside the scope of the Douglas Amendment. Accordingly, *Lewis* does not govern the resolution of this case and there is no conflict between *Lewis* and the decision below.

III. THE OUTCOME IN THE *DIMENSION* CASE SHOULD NOT AFFECT THE VALIDITY OF THE DECISION BELOW

In *Dimension*, the Tenth Circuit held that the Board acted beyond the scope of its authority under the BHC Act when it adopted regulations defining "demand deposits" and "commercial loans" for purposes of the statutory definition of "bank" in Section 2(c). The Tenth Circuit based this decision upon its specific findings that the Board had incorrectly included negotiable order of withdrawal ("NOW") accounts within its definition of "demand deposits" and had erroneously included certain money market and interbank transactions (*e.g.*, the sale

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[38] *See Suspension of Processing of Applications to Acquire Nonbank Banks*, 71 Fed. Res. Bull. 323 (1985).

of federal funds and the purchase of certificates of deposit) within its definition of "commercial loans."

The Tenth Circuit's holdings in *Dimension* are *not* applicable to this case. It is agreed that U.S. Trust-Florida *does* accept "demand deposits" and does *not* make "commercial loans," as defined by *both* the Board and the Tenth Circuit. Moreover,. the Tenth Circuit specifically *declined* to consider the question presented in *this* case—*viz.*, whether the Douglas Amendment prohibits bank holding companies from establishing deposit-taking banks across state lines without state authorization—even though the Tenth Circuit acknowledged that the Douglas Amendment "is a significant factor in the mix of state and federal regulation." 744 F.2d at 1410.

Accordingly, this Court's disposition of the *Dimension* case should not affect the validity of the decision below. However, the court below indicated that its interpretation of the legislative history of the 1970 amendment to Section 2(c) was "in conflict with some of the language used by the Tenth Circuit in *Dimension*."[39] For the reasons stated in Part I(B), *supra*, Respondents maintain that the interpretation of the court below is correct and should be upheld. If, however, this Court determines that (i) any conflict between *Dimension* and the decision below is so substantial that this Court's decision in *Dimension* could affect the validity of the decision below, and (ii) it would not be appropriate to summarily affirm the decision below pursuant to Rule 23.1 of the Rules of

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[39] 760 F.2d at 1142 n.15, Pet. App. A13-A14. The Tenth Circuit concluded in *Dimension* that the 1970 amendment "permitted the development of the non-bank banks." 744 F.2d at 1407. While acknowledging that Boston Safe was the only "example" given to Congress of the type of institution which would be exempted by the 1970 amendment, and that Congress was told that the amendment would have a "limited impact," the Tenth Circuit dismissed this legislative history as merely a "prediction" which proved to be incorrect. The Tenth Circuit accordingly declared that nonbank banks were not "evasions" of the BHC Act. *Id.*

this Court, Respondents request that this case be fully briefed, heard on oral argument and decided in tandem with *Dimension*.

CONCLUSION

For the reasons stated in this Memorandum, the decision below should be upheld, either by denial of certiorari or by summary affirmance. In the event that such a disposition is not deemed appropriate by this Court, Respondents request that this case be briefed, argued and decided in tandem with the *Dimension* case.

Respectfully submitted,

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